THE HON'BLE SRI JUSTICE B. SUDERSHAN REDDY

AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION No.2747 of 1999

Date:20.08.2005

Between:

K.Ramarao, S/o Veerabhadrudu, aged: 58 years, R/o Vijayawada.

… Petitioner

and

1.Commercial Tax Officer, Kothagudem, Khammam Districtl and two others.

…Respondents.

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AND

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

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JUDGMENT: (Per Sri Ramesh Ranganathan,J)

1. The proceedings of the Commercial Tax Officer, Kothagudem, Khammam District in Rc.No.A/263/96 dated 5-1-1999, whereby the tax holiday benefit of Rs.4,38,666/- given to M/s Indwell Bread was sought to be recovered from the personal property of the petitioner, is impugned in this writ petition.

2. Facts, to the extent necessary for the purpose of this writ petition, are that the petitioner, in the year 1990, started a unit to manufacture bread in the name and style of 'Indwell Bread' at Palvancha, Khammam District having taken a loan from the Andhra Pradesh state Financial Corporation for purchasing the necessary machinery and equipment. An agreement was entered with M/s Spencer's whereby the petitioner was permitted to use the Spencer brand name for his products. The unit was registered with the General Manager, District Industries Centre Khammam as a small scale industry and the petitioner applied for sales tax holiday for a period of five years in the light of G.O.Ms.No.498 dated 16-10-1989.

3. The Liberalized State Incentive Scheme for setting up new industries in the State of Andhra Pradesh, as envisaged in G.O.Ms.No.498 dated 16.10.1989, provides for concession of five years sales tax holiday subject to a ceiling of Rs.35 lakhs on the sales tax during the entire holiday period, to small scale industries set up on or after 3-10-1989 and which commence commercial production on or before 31-3-1995. The State Government, in its memo No.2125/IA/89 dated 15-9-1990, clarified that exemption given to small scale industries from payment of sales tax, for a period of five years from the date of commercial production, was limited to 100 % fixed capital investment or Rs.35 lakhs whichever is less.

4. Petitioner submits that the capital investment of his industry was determined by the General Manager, District Industries Centre, Khammam as Rs.9.51 lakhs and accordingly the industry was granted sale tax holiday for an amount of Rs.6,91,003/- for a period of five years from 19-2-1991 to 18-2-1996, that the unit faced several legal problems in 1993-94, which coupled with heavy competition in the market, ultimately resulting in it becoming sick and unviable and consequently production was stopped by the end of March, 1995, by which date the amount of sale tax holiday enjoyed by the unit was for Rs.4,38,666/-, that production in his factory did not go on in view of lock out in the year 1993 followed by a strike and that the industry was ultimately closed down by the end of March, 1995, for reasons beyond the control of the management and for unforeseen circumstances. It is also stated that no sale tax was collected from customers or from dealers at any point of time by the petitioner's unit from the beginning till its closure.

5. The 1st respondent – Commercial Tax Officer, Kothagudem issued notice dated 24-10-1996 asking the petitioner's unit to pay the sales tax holiday benefit of Rs.4,38,666/- as it did not continue production up to 18-2-1996. The petitioner submitted his reply, vide letter dated 12-11-1996, stating that the industry was closed down due to several problems and that there were no circumstances warranting withdrawal of the sales tax holiday benefit. The 1st respondent issued orders dated 5-1-1999 directing the petitioner to pay the tax holiday amount of Rs.4,38,666/- within 15 days failing which his personal property was to be put to auction for recovery of sales tax.

6. Petitioner contends that G.O.Ms.No.498 does not stipulate any condition that the industry availing sales tax holiday has to necessarily run for a period of five years

notwithstanding calamities or other circumstances beyond his control. The proceedings of the General Manager District Industries Centre, Khammam dated 16-3-1992, which requires the industry to be in continuous production till 18-2-1996, is contended to be illegal to the extent it incorporates a condition not in accordance with G.O.Ms.No.498 dated 16-10-1989. It is the case of the petitioner that the proceedings of the 2nd respondent – General Manager, District Industries Centre dated 16-3-1992 does not provide for automatic cancellation of sales tax holiday for nonfulfilment of the condition of continuous production of the unit till 18-2-1996. Petitioner contends that it is for the concerned authorities to cancel the benefit under the scheme for valid reasons after giving a valid notice and not for the Commercial Tax Officer (1st respondent) to take a unilateral decision seeking payment of the tax holiday amount on the assumption that the sales tax holiday exemption had elapsed. Petitioner further contends that the authorities are not empowered to impose conditions which do not find place in the scheme itself.

7. In the additional affidavit filed by the petitioner, it is stated that for the assessment years 1991-92 to 1994-95 assessments were completed by the Commercial Tax Officer and final orders were passed, whereunder there are no tax payable by M/s Indwell Bread, that the orders have become final and there will be no subsequent proceedings revising or reviewing them under the provisions of the A.P.G.S.T.Act. Petitioner contends that in the light of the said proceedings, the 1st respondent is not entitled to raise the impugned demand either against the Industry or against the petitioner in his personal capacity.

8. On behalf of respondents 2 and 3, the then General Manager, in charge of District Industries Centre, Kothagudem filed a counter affidavit. The case of the respondents 2 and 3, as stated in the counter affidavit, is that the petitioner had failed to submit any progress report to the Industries Department as per the provisions of G.O.Ms.No.498, Industries & Commerce (IA) Department dated 16-10-1989 and that the petitioner had not kept the Department informed of the problems faced by him in running the industry. While acknowledging that the petitioner's unit stopped production since March, 1995, it is contended that since the unit did not run for a continuous period of five years from 19-2-1991 to 18-2-1996, the sales tax holiday benefit enjoyed by to the petitioner was liable to be recovered by the Commercial Tax Department as per the provisions of G.O.Ms.No.498 dated 16-10-1989. It is further stated that since the petitioner did not run the unit for a continuous period of

five years from the date of production, the petitioner was liable to pay the sales tax holiday availed by him during the period the industry worked and business conducted. Reference is mad to the manual of guidelines, for implementation of new package of incentives under the Liberalized State Incentives Scheme, 1989, whereunder the petitioner had furnished an affidavit, as per Annexure IX, assuring the State Government that the said incentive amounts would be used wholly and solely for the development of the unit and that in case of non-utilization or mis-utilization of the amount granted, apart from other consequences, the petitioner agreed to forego his eligibility for the continuance of incentives and other financial concessions for further years under G.O.Ms.No.498 dated 16-10-1989 and had also agreed to pay back the incentives and financial concessions already granted, failing which the amount could be recovered by the Government by adopting summary procedure as if the amounts due were arrears of land revenue under the A.P. Revenue Recovery Act, 1864. Reference is made to item No.21 in the approved manual of guidelines for implementation, which provides for the circumstances under which the incentives granted to an industrial unit are to be recovered. Clause (ii) of Item 21, reads as under:

"The Industrial Unit goes out of production within five years from the date of commencement of production except in case where the Unit remains out of production for short period extending to six months due to the reasons beyond its control such as shortage of raw-material, power etc."

The case of the 2nd respondent is that the petitioner's unit was closed by the end of March, 1995 and as it did not start within six months thereafter, the sales tax holiday availed by the petitioner is to be recovered by the Government treating it as arrears of land revenue under the A.P. Revenue Recovery Act, as per Item 21 of the Manual of Guidelines.

9. A Counter affidavit is filed on behalf of the Commercial Tax Officer wherein the dates of completition of assessment, granting sales tax exemption in terms of eligibility in G.O.Ms.No.498, dated 16.10.1989, are specified as under:-

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Year Date of Asst. GTO ETO NTO Tax Due and Exemption

Allowed

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1. 1990-91 22.05.1992 1,00,652 -- 1,00,652 5,536

2. 1991-92 30.09.1992 27,10,450 -- 27,10,450 1,63,460

3. 1992-93 26.07.1993 30,50,990 -- 30,50,990 1,84,585

4. 1993-94 16.10.1996 14,08,856 -- 14,08,856 85,236

5. 1994-95 NIL -- -- -- --

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10. It is contended that since the petitioner had flouted the condition of continuous production for availing tax holiday he is required to pay back the tax holiday amounts availed by him and it is in this regard that the notice dated 05.01.1999 had been issued calling upon the petitioner to pay back the tax holiday amount of Rs.4,38,666/-.

11. It is further stated that, in terms of the affidavit filed by the petitioner and in terms of item 21 “recoveries” in the Approved Manual of Guidelines for implementation of the Incentive Scheme envisaged in G.O.Ms.No.498, dated 16.10.1989, since the petitioner had closed the unit by March, 1995 and did not start it again within six months, the sales tax holiday availed by him, was required to be recovered by the Government. It is contended that for the assessment year 1992-93, no revision was taken up in view of the specific undertaking by the petitioner, in-continuous production and also due to the reason of the interim stay granted by this Court. It is further contended that for the assessment years 1993-94 and 1994-95, time is available for revision and that the assessments for these years had not become final as erroneously contended by the petitioner.

12. Sri Vedula Srinivas, learned counsel for the petitioner contends that the impugned proceedings of the Commercial Tax Officer dated 5-1-1999 is liable to be set aside for the following reasons:

(a) Neither G.O.Ms.No.498 dated 16-10-1989 nor the clarification issued by the Government in Memo dated 15-9-1990 require the industry to necessarily run for five

years from the date of commencement of production notwithstanding calamities and other problems connected with the industry.

(b) The proceedings of the 2nd respondent dated 16-3-1992 which requires the industry to be in continuous production till 18-2-1996, being contrary to the aforesaid Government orders, is illegal and invalid.

© Even otherwise the proceedings dated 16-3-1992 cannot be interpreted to mean that non-fulfillment of the condition of continuous production of the unit till 18-2-1996 results in automatic cancellation of the tax holiday benefit.

(d) While it is open for the authorities to sanction the benefit or cancel it for valid reasons after giving notice, the 1st respondent – Commercial Tax Officer is not entitled to demand payment of tax holiday.

(e) The Manual of Guidelines and the affidavit in Annexure IX which enables the Government to recover sales tax subsidy, as arrears of land revenue, would only apply where the subsidy is either not utilized or is mis-utilized and since it is not the case of the respondents that there was mis-utilization of subsidy, the manual of guidelines has no application.

(f) The assessment orders for the five years period from 1990-91 to 1994-95 reflect the sales tax subsidy granted in favour of the petitioner's unit. The assessment orders having attained finality, not being subject matter of the appeal or revision, cannot be reopened to recover the sales tax holiday benefit.

(g). The impugned proceedings, which in effect amounts to review or revision of the assessment orders which have attained finality, is beyond the power of the 1st respondent – Commercial Tax Officer.

13. It is unnecessary to examine the other ground raised in the writ petition, since we are of the view that the impugned order is liable to be set aside, as the 1st respondent is not, in the facts and circumstances of the present case, empowered to reopen the assessment orders already passed by him under the A.P.G.S.T.Act.

Section 14 of the Andhra Pradesh General Sales Tax Act, which relates to assessment reads thus:

1. If the assessing authority is satisfied that any return submitted under

Section 13 is correct and complete, he shall assess the amount of tax payable by the dealer on the basis thereof; but if the return appears to him to be incorrect or incomplete he shall, after giving the dealer a reasonable opportunity of proving the correctness and completeness of the return submitted by him and making such inquiry as he deems necessary, assess to the best of his judgment, the amount of tax due from the dealer. An assessment under this Section shall be made only within a period of three years from the expiry of the year to which the assessment relates:

Provided that notwithstanding the amendment made to sub-section (1) by the Andhra Pradesh General Sales Tax (Third Amendment) Act, 1995 the period for assessment under this sub-section shall continue to be four years for the years proceeding to the year 1992-93.

(1-A) Where the return submitted by a dealer includes the turnover or any of the particulars thereof which would not have been disclosed but for an inspection of accounts, registers or other documents of the dealer made by an officer authorized under this Act before the submission of such return, the assessing authority may, after giving an opportunity to the dealer for making a representation in this behalf, treat such return to be an incorrect or incomplete return within the meaning of sub-section (1) and proceed to take action on that basis.

(1-B) Every dealer whose turnover is not less than rupees forty lakhs in a year, shall, within such time as may be prescribed, furnish a certificate of audit along with the other statements as may be prescribed duly certified by a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949 (Central Act 38 of 1949); and if any dealer who fails to furnish the same shall be liable for penalty of rupees one lakh or an amount equivalent to one-half percent of the total turnover relating to the relevant assessment year whichever is less:

Provided that before levying such penalty, the assessing authority shall give the dealer a reasonable opportunity of being heard.

2. When making assessment to the best of judgment under sub-section (1), the assessing authority may also direct the dealer to pay in addition to the tax assessed a penalty as specified in sub-section (8) on the turn over that was not disclosed by the dealer in his return.

3. Where any dealer liable to tax under this Act-

   i. fails to submit return before the date prescribed in that behalf, or

   ii. produces the accounts, registers and other documents after inspection, or

   iii. submits a return subsequent to the date of inspection, the

assessing authority may, at any time within a period of six yeas from the expiry of the year to which assessment relates, after issuing a notice to the dealer and after such enquiry as he considers necessary, assess to the best of his judgment, the amount of tax due from the dealer on his turnover for that year, and may direct the dealer to pay in addition to the tax so assessed a penalty as specified in sub-section (8).

4. In any of the following events, namely where the whole or any part of the turnover of a business of a dealer has escaped assessment to tax, or has been under-assessed or assessed at a rate lower than the correct rate, or where the licence fee or registration fee has escaped levy or has been levied at a rate lower than the correct rate, the assessing authority may, after issuing a notice to the dealer, and after making such enquiry as he may consider necessary, by order, setting out the grounds therefore-

a. determine to the best of his judgment the turnover that has escaped assessment and assess the turnover so determined;

b. assess the correct amount of tax payable on the turnover that has been under-assessed;

c. assess at the correct rate the turnover that has been assessed at a lower rate;

cc. assess the correct amount of tax payable, in a case where any deduction or exemption has been wrongly allowed;

d. levy the licence fee after determining to the best of his judgment the turnover on which such fee is payable;

e. levy the registration fee that has escaped levy;

f. levy the correct amount of licence fee or registration fee in a case where such fee has been levied at a rate lower than the correct rate.

In addition to the tax assessed or fee levied under this sub-section, the assessing authority may also direct the dealer to pay a penalty as specified in sub-section(8).

(4-A) Any assessment or levy under sub-section (4) shall be made within a period of four years from the date on which any order of assessment or levy was served on the dealer.

(4-B) Before issuing any direction for the payment of any penalty under sub-section (2), sub-section (3) or sub-section (4), the assessing authority shall give the dealer a reasonable opportunity to explain the omission to disclose the turnover or to furnish correctly any particulars and shall make such enquiry as he considers necessary.

(4-C) The powers conferred by sub-section (4) on the assessing authority may, subject to the same conditions as are applicable in the case of that authority; be exercised also by any of the authorities higher than the assessing authority including (The Assistant Commissioner (Intelligence), the Deputy Commissioner and the Joint Commissioner).

(5) Where an assessment under this section has been deferred on account of any stay order granted by the Special Appellate Tribunal in any case, or by reason of the fact that an appeal or other proceedings is pending before the Special Appellate Tribunal or the Supreme Court involving a question of law having a direct bearing on the assessment in question, the period during which the stay order was in force or such appeal or proceeding was pending shall be excluded in computing the period of four years or six years as the case may be specified in this section for the purpose of making the assessments.

(6) It shall be lawful for the Commissioner of Commercial Taxes to direct, by general or special order, any assessing authority to defer assessment in respect of any class of goods or any class of dealers pending clarification by it of any question referred to it, if such question has a direct bearing on such assessment. The period between the date of such direction and the date on which such clarification has been received shall be excluded in computing the period of four years or six years, as the case may be, specified in this section for the purpose of making the assessment.

(7) Where an assessment made under this section has been set aside by any court or other competent authority under this Act for any reason the period between the date of such assessment and the date on which it has been set aside shall be excluded in computing the period of four years or six years, as the case may be, specified in this section for the purpose of making any fresh assessment.

(7-A) Where there has been delay on the part of the dealer in the production of accounts and statements for the purposes of making the assessment, in the submission of reply or objections to the notice of assessment.

a. the period between the date of issue of first notice by the assessing authority calling for production of accounts and Statements and the date of actual production of such accounts and statements; and

b. the period between the date of issue of notice of assessment and the date of actual submission of reply or objections;

shall be excluded in computing the period of four years or six yeas, as the case may be, specified in this section for the purpose of making the assessment.

(8) The penalty leviable under sub-section (2), sub-section (3) or sub-section (4).

a. shall not be less than three times but which may extend to five times the tax or the fee, due in a case where the assessing authority is satisfied that the failure of the dealer to disclose the whole or part of the turnover or any other particulars correctly, or to submit the return before the prescribed date, was willful; and

b. shall not exceed one half of the tax or the fee due in a case where such failure was not willful:

Provided that where such failure occurred due to a bonafide mistake on the part of the dealer, no such penalty shall be levied.

Explanation:- The expression 'assessing authority' occurring in this section shall, in relation to licence fee or registration fee, be construed as referring to the licensing or registering authority, as the case may be, under this Act.

14. It is thus clear that it is only under certain specific circumstances, such as those prescribed under Section 14(3) and 14(4), that powers are conferred on the assessing authority to make assessment, other than the one prescribed under Section 14(1). In the absence of any specific power being conferred, it is not open to the assessing authority to reopen the assessment orders, for theyears 1991-92 to 1994-95, already passed by him in the years 1992, 1993 and 1996.

15. This Court, by order dated 12.02.1999, stayed all further proceedings pursuant to the order dated 05.01.1999 whereby the petitioner was required to pay sales tax of Rs.4,38,666/-. The order of this Court dated 12.02.1999 did not preclude the Commercial Tax Authorities from revising the assessment orders, passed by the 1st respondent, in case they so desired. In the absence of any specific power being conferred on the assessing authority to reopen the assessment orders already passed, in situations such as the one arising in the present case, the impugned order dated 05.01.1999 passed by the 1st respondent Commercial Tax Officer is without jurisdiction and is liable to be set aside.

16. It is however made clear that this order shall not come in the way of the respondents taking such action, to recover the sales tax holiday amount availed by the petitioner of Rs.4,38,666/- as is available to them in law, nor would it preclude

the petitioner herein from raising all such pleas in his defence, as are permitted in law, in case any such action is initiated by the authorities concerned to recover the sales tax holiday amount availed by the petitioner.

17. The writ petition is accordingly disposed of. No order as to costs.

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B. SUDERSHAN REDDY, J

Date: 20.8.2005

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RAMESH RANGANATHAN, J

MRKR/ASP